FILE COPY

Office Supreme Court, U.S.
FILED
SEP 19 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 384

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Petitioner,*

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARTHUR LAZARUS, JR.
1700 K Street, Northwest
Washington 6, D. C.
Attorney for Petitioner.

Of Counsel:
EUGENE GRESSMAN
1700 K Street, Northwest
Washington 6, D. C.

September 19, 1958.

Pigott & Byron S. Adams, Washington, D. C.

INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	11
1. The Decision Below Raises an Important and Novel Question of Judicial Administration Which Calls for an Immediate Remand of the Case to the District Court With Directions to Hold the Matter in Abeyance Pending a Final Decision as to the Validity of the Federal Power Commission License	11
2. The Decision Below Raises an Important and Novel Question as to When a Congressional Intent to Lift Special Statutory Protections Over Indian Tribal Lands May be Spelled Out by Implication	16
Conclusion	21
Appendix A (Court of Appeals opinion)	1a
Appendix B (Order denying rehearing)	20a
Appendix C (District Court opinion)	21a

Table of Cases

A. F. of L. v. Watson, 326 U.S. 582 (1946) 15
Choate v. Trapp, 224 U.S. 665 (1912) 19
Chouteau v. Commissioner, 38 F. 2d 976 (C.A. 10, 1930) 18
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 12, 13
Elk v. Wilkins, 112 U.S. 94 (1884) 18
Johnson v. McIntosh, 8 Wheat. (U.S.) 543 (1823) 17

Page

Johnson v. Tuscarora Nation of Indians, No. , October Term, 1958 9
Jones v. Meehan, 175 U.S. 1 (1899) 19
Power Authority of the State of New York v. 1383.55 Acres of Land, etc., Civil Action No. 7934 (W.D. N. Y.) 9
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) 13, 15
Safe Harbor Water Corp. v. Federal Power Commission 124 F. 2d 800 (C.A. 3, 1941) 12
Seufert Bros. Co. v. United States, 249 U.S. 194 (1919) 19
Shipman v. DuPre, 339 U.S. 321 (1950) 15
Spalding v. Chandler, 160 U.S. 394 (1896) 20
Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944) 15
Squire v. Capoeman, 351 U.S. (1956) 18
The Kansas Indians, 5 Wall. (U.S.) 737 (1867) 17
Tulee v. Washington, 315 U.S. 681 (1942) 19
Tuscarora Indian Nation v. Federal Power Commission, No. 14,475 ..... 6, 12
Tuscarora Nation of Indians v. Power Authority of the State of New York, 171 F. Supp. 702 (S.D. N.Y., 1958) 8
United States v. Kagama, 118 U.S. 375 (1886) 17
United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938) 19
United States v. 2005.32 Acres of Land, etc., 160 F. Supp. 193 (D.S.D., 1958) 18
United States v. Winans, 198, U.S. 371 (1905) 19
Winters v. United States, 207 U.S. 564 (1908) 19
Winton v. Amos, 255 U.S. 373 (1921) 17
Worcester v. Georgia, 6 Pet. (U.S.) 515 (1832) 17

TREATIES AND STATUTES

Act of August 21, 1957, 71 Stat. 401 ..... 3, 5, 8, 11, 17

Federal Power Act
Section 4(e), 16 U.S.C. 797(e) 5, 6, 7, 12, 16
Section 21, 16 U.S.C. 814 ..... 8, 9, 11
Section 313(b), 16 U.S.C. 8251(b) 3, 10, 12
Section 313(c), 16 U.S.C. 8251(c) 13

Page

Judicial Code
28 U.S.C. 1254(1) 2
28 U.S.C. 1254(2) 20
28 U.S.C. 1331 7
28 U.S.C. 1392(b) 8
28 U.S.C. 1406(a) 8
28 U.S.C. 2201 7
28 U.S.C. 2202 7

New York Highway Law, Section 30 7
New York Public Authorities Law, Article 5, Title 1 .. 7
Treaty of November 11, 1794, 7 Stat. 44 5
Treaty of February 27, 1950, 1 U.S.T. 694 5
25 U.S.C. 177 ..... 4, 8, 17
25 U.S.C. 233 ..... 4, 8, 17

MISCELLANEOUS

103 Cong. Rec. 11974 *et seq.* 19
House Rep. No. 862, 85th Cong., 1st Sess. 19
Senate Rep. No. 539, 85th Cong., 1st Sess. 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Petitioner*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 24, 1958, as modified by order dated August 26, 1958.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated July 24, 1958, is not yet reported. A copy thereof is annexed hereto as Appendix A, p. 1a.

infra. The court's unreported order of August 26, 1958, denying the petition for rehearing and modifying the stay provisions of the judgment, is annexed hereto as Appendix B, p. 20a, *infra*. The opinion of the District Court for the Western District of New York, dated June 24, 1958, also is unreported and is annexed hereto as Appendix C, p. 21a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1958, and a timely petition for rehearing was denied without opinion on August 26, 1958. The judgment was modified as to its stay provisions on the latter date. On September 8, 1958, Mr. Justice Harlan stayed the execution and enforcement of the District Court judgment with one minor exception and on certain conditions, the most immediately important being that this petition for a writ of certiorari be filed on or before September 19, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether sound judicial administration of the Federal Power Act precludes one Court of Appeals from rendering a decision which assumes the validity of a Federal Power Commission license prior to any decision on the validity of that license by another Court of Appeals having exclusive jurisdiction under the Act to make such a determination.

2. Whether this Court, pending a final determination of the validity of a Federal Power Commission license covering petitioner's lands, should grant interim relief to prevent the imminent condemnation and destruction of these lands pursuant to a lower

court decision which presupposes the validity of the license.

3. Whether a Congressional intent to lift the specific Federal protections against the alienation of Indian tribal lands can be implied from a general statute which merely authorizes the construction of a power project and does not expressly mention either the Indians or their property.

STATUTES INVOLVED

Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b):

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. * * *

Act of August 21, 1957, 71 Stat. 401:

> (a) [T]he Federal Power Commission is hereby expressly authorized and directed to issue a license

to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following: * * *

R.S. § 2116, 25 U.S.C. § 177:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * *

Act of September 13, 1950, 25 U.S.C. § 233:

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: * * * *And Provided further,* That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: * * *.

STATEMENT OF THE CASE

Petitioner, the Tuscarora Nation of Indians, is a recognized tribe of American Indians which owns and occupies a reservation of 6,249 acres in Niagara

County, New York. Originally residents of North Carolina, the Tuscarora Indians in the early Eighteenth Century forcibly were evicted from their homes by white settlers and fled to New York, where they were adopted as the sixth nation of the famed Iroquois Confederacy. Members of the Tuscarora Nation continuously have lived in and around the site of their present reservation since the year 1780.

Within the Tuscarora Reservation, petitioner to this day maintains a unique Indian community governed by a Chiefs Council in accordance with the Nation's time-honored customs and traditions. All of the land is held in common ownership, although a substantial portion is assigned to individuals for homesites and other beneficial purposes. Among other Federal benefits, the Tuscarora Indians still receive an annual annuity from the United States under the Treaty of November 11, 1794, 7 Stat. 44.

This case has its origins in an application to the Federal Power Commission by respondent Power Authority of the State of New York for a license to build Project No. 2216, the so-called Niagara Project, under Section 4(e) of the Federal Power Act and Public Law 85-169, 85th Congress, 71 Stat. 401. In its application, respondent proposed to construct and operate hydroelectric facilities to utilize all of the waters of the Niagara River which lawfully could be diverted for power purposes under the terms of the February 27, 1950 treaty between the United States and Canada. 1 U.S.T. 694. Included in the various facilities to be so constructed was a pumped storage reservoir covering some 2,800 acres of land.

Petitioner intervened in the proceedings before the Commission, protesting that the proposed reservoir

would cover approximately 1,000 acres of land within the Tuscarora Reservation and contesting the authority of the Power Authority to acquire Indian land for such use.

On January 30, 1958, the Commission entered an order issuing the proposed license to the Power Authority. In the opinion accompanying that order, the Commission refused to pass upon petitioner's contentions on the ground that "other lands are available for reservoir use if the Applicant is unable to acquire the Indian lands, although alternative lands may be more expensive." Subsequently, on March 21, 1958, the Commission denied the Tuscarora Nation's request for a rehearing, adding that whether the Power Authority was entitled to acquire petitioner's land in eminent domain proceedings was "a question to be resolved by a court of competent jurisdiction" and that "we are not required to render an advisory opinion on that question." The Commission also overruled petitioner's claim that the Commission had erred in failing to make a finding as required by Section 4(e) of the Act that the purpose for which Tuscarora lands were to be used under the license was not inconsistent with the purpose for which the Indian reservation was created or acquired.

Thereafter the petitioner duly filed a petition for review of the Commission's order granting the license in the United States Court of Appeals for the District of Columbia Circuit, pursuant to the provisions of Section 313(b) of the Federal Power Act, and that petition for review now is pending before said court. *Tuscarora Indian Nation v. Federal Power Commission*, No. 14,475. The petition raises issues as to the

authority of the Commission to issue a license affecting Indian lands without the express consent of Congress and as to the propriety of the Commission's refusal, on the basis of evidence outside the formal record, to make necessary findings under Section 4(e) of the Act.

In the meantime, respondent Power Authority on March 21, 1958, filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,300 acres of land belonging to the petitioner. On April 15, 1958, however, this judicial proceeding was abandoned. Instead, the Power Authority, allegedly acting "pursuant to Article 5, Title 4 of the Public Authorities Law and the applicable provisions of Section 30 of the Highway Law" of New York, purported to appropriate some 1,383 acres of land in the Tuscarora Reservation for use as a storage reservoir by the mere filing of a map in the office of respondent John W. Johnson, the State Superintendent of Public Works.

On April 18, 1958, petitioner filed the instant complaint in the United States District Court for the Southern District of New York under 28 U.S.C. §§ 1331, 2201 and 2202. That complaint sought, *inter alia*, a declaratory judgment to the effect that the Power Authority had no right to acquire lands of the petitioner without the express consent of the United States and a permanent injunction prohibiting the Power Authority from acquiring or attempting to acquire by appropriation or otherwise lands belonging to petitioner in the absence of such consent. A temporary restraining order to the latter effect and further prohibiting the Power Authority from entering the Tuscarora Reservation, with certain excep-

tions, was entered by the court. The case then was transferred to the United States District Court for the Western District of New York pursuant to 28 U.S.C. §§ 1392(b) and 1406(a). *Tuscarora Nation of Indians v. Power Authority of the State of New York*, 161 F. Supp. 702 (S.D. N.Y., 1958).

On June 24, 1958, following a hearing, the District Court for the Western District of New York dissolved the temporary restraining order, denied the motion for a permanent injunction and dismissed the complaint. Appendix C hereto. Immediately thereafter, petitioner prosecuted an appeal to the United States Court of Appeals for the Second Circuit, which reinstated the stay previously in effect, with minor modifications, pending a final decision on appeal.

The Court of Appeals, on July 24, 1958, reversed the District Court insofar as it had dismissed the complaint and thereby had blocked the petitioner from any relief by way of a declaration of rights. Appendix A hereto. The court held that the Federal Government, by virtue of 25 U.S.C. §§ 177 and 233, had retained paramount authority to control the alienation of Indian tribal lands in New York, but that these protective statutes were subordinate to the right of eminent domain of the United States. Authority to exercise the latter right with respect to Indian reservations then was found in the direction given by Congress to the Federal Power Commission to issue a license to the Power Authority (71 Stat. 401) and in the vesting in licensees of the governmental power of eminent domain (Sec. 21 of the Federal Power Act, 16 U.S.C. § 814).

The Court of Appeals concluded that respondent Power Authority thus could institute condemnation

proceedings in either a state or federal court pursuant to the procedure established by Section 21 of the Act. Since the Power Authority had proceeded to appropriate petitioner's property under the Highway Law and the Public Authorities Law of the State of New York, however, and since Congress had not specifically declared that this method of taking could be used, the appropriation was vacated and annulled. This aspect of the Court of Appeals ruling, dealing with the inapplicability of the aforementioned New York statutes, is the subject of an appeal now pending in this Court filed by the respondent Superintendent of Public Works of the State of New York. *Johnson* v. *Tuscarora Nation of Indians*, No. , Oct. Term, 1958.

In its opinion, the Court of Appeals stayed the respondents from entering upon or damaging lands within the Tuscarora Reservation "pending the final determination of this action or any proceeding seeking to acquire the property in question" except to the extent theretofore permitted under previous stay orders. The court then requested that the District Court expedite all proceedings "as much as possible" should respondent Power Authority desire to exercise its right of eminent domain in a federal court. Almost immediately thereafter, on July 27, 1958, the Power Authority instituted a condemnation suit in the District Court for the Western District of New York pursuant to the suggestion of the Court of Appeals. *Power Authority of the State of New York* v. *1383.55 Acres of Land, et al.*, Civil Action No. 7934 (W.D. N.Y.).

On August 26, 1958, the Court of Appeals denied a petition for rehearing which the Tuscarora Nation

had timely filed. See Appendix B hereto, pp. 20a-21a, *infra*. In that request for rehearing, petitioner urged that Congress never intended to sanction the taking of Indian lands for the Niagara Power Project. Petitioner further urged that the court "should not assume the validity of appellee's license pending a decision on the Tuscarora Nation's petition for review of the Commission's order granting that license by the Court of Appeals for the District of Columbia Circuit, the tribunal having exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, 16 U.S.C. § 825*l*(b)." The latter contention was presented to the Court of Appeals for the first time in the petition for rehearing since the matter had not been in issue prior to the opinion and judgment of that court. Contemporaneous with the denial of the rehearing petition, the court ordered that its mandate issue six days thereafter and that upon issuance of the mandate the stay granted in the opinion "pending final determination of this action" would cease. See Appendix B hereto, p. 21a, *infra*.

Petitioner then applied to Mr. Justice Harlan of this Court for a stay of the mandate of the Court of Appeals pending the filing and final determination of this petition for a writ of certiorari. On September 8, 1958, following a hearing, Mr. Justice Harlan ordered that the mandate of the Court of Appeals be allowed to issue, but that the execution and enforcement of the judgment entered pursuant thereto be stayed pending the filing and determination of this petition on certain conditions and with one exception. The only condition presently relevant is that this petition shall have been filed on or before September 19, 1958. The one exception to the stay involved "the Power

Authority's right to acquire in the pending condemnation proceedings Tuscarora's lands and the possession thereof for the purpose of constructing power lines around the proposed reservoir included in the Niagara Power Project."

On September 15, 1958, the District Court for the Western District of New York in the condemnation proceedings denied a motion for summary judgment filed by respondent Power Authority, but permitted the Power Authority to enter upon petitioner's land to erect power lines in accordance with the terms of the order entered by Mr. Justice Harlan.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important and Novel Question of Judicial Administration Which Calls for an Immediate Remand of the Case to the District Court With Directions to Hold the Matter in Abeyance Pending a Final Decision as to the Validity of the Federal Power Commission License.

The court below held, *inter alia*, that "the Power Authority of the State of New York as a licensee of the Federal Power Commission directed to issue a license pursuant to Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401) is authorized to exercise the right of eminent domain according to the procedures specified in section 814 of the Federal Power Act (16 U.S.C.A. section 814)." Appendix A, p. 18a, *infra*. In so ruling, the court necessarily assumed that the license issued by the Federal Power Commission to the Power Authority is valid as to petitioner's lands, and that the Power Authority was properly authorized under the provisions of the Federal Power Act to exercise the governmental power of eminent

domain. Based upon the holding stemming from this assumption, the Power Authority has instituted condemnation proceedings which will result, unless stayed by action of this Court at this time, in the complete and immediate destruction of petitioner's lands within the reservoir area.

The basic assumption underlying the decision below, however, is the precise issue at stake in the pending license review proceedings before the Court of Appeals for the District of Columbia. *Tuscarora Indian Nation* v. *Federal Power Commission*, No. 14,475. Petitioner has filed in that court a petition for review of the Commission's order granting a license to respondent Power Authority, claiming: (1) that the Commission had no authority to issue a license affecting petitioner's reservation without the express consent of Congress; and (2) that the Commission erred not only in refusing to make certain findings required by Section 4(e) of the Act with respect to Indian tribal lands, but also in basing that refusal upon evidence outside the record.

These issues, which lie at the very heart of the assumption underlying the decision below, are ones within the *exclusive* jurisdiction of the Court of Appeals for the District of Columbia. Sec. 313(b) of Federal Power Act, 16 U.S.C. § 825l(b); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-337 (1958); *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 124 F. 2d 800, 804 (C.A. 3, 1941). Neither the court below nor this Court upon review of the judgment below can resolve these issues as to the validity of the license order. "For Congress, acting within its powers, has declared that the Court of Appeals [in this case, that of the District of

Columbia] shall have 'exclusive jurisdiction' to review such orders, and that its judgment 'shall be final', subject to review by this Court upon certiorari or certification." *City of Tacoma* v. *Taxpayers of Tacoma, supra,* at 336.

The decision below thus poses an important and unique problem in the judicial administration of the Federal Power Act, a problem which demands immediate action in view of the imminence of the destruction of petitioner's lands. By premising its judgment on "a forecast rather than a determination," *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 499 (1941), as to the validity of the license order under the Federal Power Act, the court below has encroached upon the exclusive jurisdiction of the Court of Appeals for the District of Columbia.

The results of such aggrandisement necessarily are chaotic. Should the District of Columbia court eventually determine that the license is invalid or that substantive or procedural defects dictate a remand of the matter to the Commission for further consideration, the underlying assumption of the judgment below would collapse and all subsequent proceedings based thereon become invalid. Meanwhile, if this Court does not grant some measure of relief, the petitioner's property will be irrevocably damaged or destroyed before any such ruling can issue.[1] Indeed, with its

[1] At this point, the Court of Appeals for the District of Columbia Circuit effectively is precluded from granting a stay pursuant to Section 313(c) of the Federal Power Act, 16 U.S.C. § 825*l*(c), since the condemnation court, the District Court for the Western District of New York, is operating under, and bound by, the mandate of the Court of Appeals for the Second Circuit.

reservation already invaded and overcome, the Tuscarora Nation would have little purpose in further pursuing the license review procedure. Unless at least interim protection now is accorded the petitioner, therefore, the statutory scheme of vesting exclusive jurisdiction to review Commission licenses in the Court of Appeals in which the petition for review is filed will be wholly frustrated and made meaningless.

Moreover, should the District of Columbia decision be favorable to petitioner's contentions, a direct conflict with the ruling below would be created as to the validity of the license. Only this Court could resolve that conflict. Preservation of the status quo thus is essential if this Court's jurisdiction to resolve such a possible conflict between circuits is not to be mooted by the irrepressible course of condemnation proceedings in the wake of an unstayed mandate.

The Court of Appeals for the Second Circuit has assumed as a present fact what is in reality an unsettled issue. At best, the decision below in presupposing the validity of the Commission license is premature and unjustified by virtue of the pending review proceedings in the Court of Appeals for the District of Columbia and in violation of basic principles of comity. At worst, the decision below is wrong as a matter of law. In either event, the Tuscarora Nation can look only to this Court to preserve the judicial review procedures of the Federal Power Act and to protect its lands from what probably is an unwarranted and unlawful condemnation.

Accordingly, petitioner suggests that this Court, in the exercise of its supervisory jurisdiction over the

administration of justice in the Federal courts, grant certiorari, vacate the judgment below and remand the case to the District Court for the Western District of New York with instructions to hold all proceedings in abeyance until the final resolution of the license review proceedings now pending in the Court of Appeals for the District of Columbia. Precedent for such action is to be found in the analagous situation involving three-judge court proceedings convened to determine the constitutionality of a state statute. There this Court frequently has ruled that such proceedings should be stayed for a reasonable time until the state courts have had opportunity to make an authoritative construction of the pertinent State statute. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941); *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944); *A. F. of L.* v. *Watson*, 327 U.S. 582 (1946); *Shipman* v. *DuPre*, 339 U.S. 321 (1950).

Respect for the Congressional mandate of exclusiveness as to the jurisdiction of the Court of Appeals for the District of Columbia and scrupulous regard "for the smooth working of the federal judiciary," *Railroad Commission* v. *Pullman Co.*, *supra*, at 501, dictate such a disposition of the instant case. If there is warrant for the condemnation now going forward in New York, it must spring from the proceedings pending in the District of Columbia. It does not lie in the mouth of the court below to resolve that issue "on the basis of preliminary guesses." *Spector Motor Service* v. *McLaughlin*, *supra*, at 105.

2. The Decision Below Raises an Important and Novel Question as to When a Congressional Intent to Lift Special Statutory Protections Over Indian Tribal Lands May be Spelled Out by Implication.

The great unknown factor in this case, of course, is the decision that will be forthcoming from the Court of Appeals for the District of Columbia with respect to the validity of the Power Authority's license and the legal propriety of the Commission's procedures in granting that license. To that uncertainty must be added the various possibilities ensuing from any effort to secure review by this Court. The suggestion made by petitioner herein that this case be remanded to the District Court to hold the matter in abeyance is premised on the very real likelihood that the District of Columbia court will hold the license defective in some manner, as well as on the need for a smooth working of the Federal judiciary in the context of the exclusive review provisions of the Federal Power Act.

At the same time, the possibility exists that the District of Columbia court will affirm the Commission's action in refusing to pass upon the petitioner's contentions with respect to the license. That court may agree with the Commission that a license proceeding is not the proper place to test the issues as to whether the Power Authority is authorized to acquire Indian tribal land and whether the Commission properly can issue a license covering such land. The court also may agree with the Commission that no findings under Section 4(e) of the Act were necessary. In such event, assuming no reversal by this Court on certiorari, the decision of the District of Columbia court would in no way be inconsistent with the ruling of the court below. Indeed, the cases then would turn on different questions.

Given these possible circumstances, it becomes apparent that the determination of the court below as to the Congressional consent given to the alienation or condemnation of petitioner's property now is ripe for review and raises an issue of substantial importance warranting the immediate exercise of this Court's certiorari jurisdiction. That issue is whether a Congressional intent to lift special statutory protections over Indian lands, which serve a key function in the Federal Government's guardianship over Indian tribes, may be spelled out by implication.

The court below properly held that the United States possesses paramount power to control and govern the territory reserved and held by Indian tribes, and that such territory may be alienated or appropriated only with the consent of Congress. *Johnson* v. *McIntosh*, 8 Wheat. (U.S.) 543 (1823); *Worcester* v. *Georgia*, 6 Pet. (U.S.) 515 (1832); *The Kansas Indians*, 5 Wall. (U.S.) 737 (1867). This general principle has been codified in R.S. § 2116, 25 U.S.C. § 177, and has been recognized as specifically applicable to Indian reservations in the State of New York by the provisions of the Act of September 13, 1950, 25 U.S.C. § 233.

The court below also correctly ruled that the Federal Government occupies a special position as the protector of Indian tribes, *United States* v. *Kagama*, 118 U.S. 375, 383-84 (1886), that only Congress can determine when that fiduciary relationship shall cease, *Winton* v. *Amos*, 255 U.S. 373, 391-92 (1921), and that Federal guardianship over the Tuscarora Nation has not yet been terminated.

Finally, the court below accurately stated that Congress in the Act of August 21, 1957, 71 Stat. 401,

did not expressly authorize the taking of part of the Tuscarora Reservation for use in the Niagara Power Project. That statute simply directed the Federal Power Commission to "issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement," in accordance with the provisions of the Federal Power Act.

The court further ruled, however, that an "implied" intent to authorize the taking of petitioner's land under the 1957 statute could be "inferred" upon consideration of the extensive character of the Project and the proximity of the required reservoir to the Tuscarora Reservation. Such a conclusion that Congressional intent to authorize the alienation of tribal lands may be found by implication or inference is directly contrary to the repeated decisions of this Court on the construction of statutes affecting Indians and is wholly inconsistent with the legislative history of the 1957 statute.

This Court consistently has held that general acts of Congress do not apply to Indians "unless so expressed as to clearly manifest an intention to include them." *Elk* v. *Wilkins*, 112 U.S. 94, 99 (1884); see also *Squire* v. *Capoeman*, 351 U.S. 1 (1956). Where a Congressional intent to affect Indians or their interests has been found, the Indians specifically have been named or their property described. *Ghouteau* v. *Commissioner*, 38 F. 2d 976, 977 (C.A. 10, 1930); *United States* v. *2005.32 Acres of Land, etc.*, 160 F. Supp. 193, 198-200 (D.S.D., 1958).

In terms of statutory construction, this Court has further ruled that treaties with Indian tribes and laws affecting Indians must be liberally construed,[2] and that doubtful expressions are to be resolved in favor of the Indians. *Winters* v. *United States*, 207 U.S. 564, 576 (1908); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912). The decision of the court below that consent may be implied or inferred from general legislation not only is contrary to these decisions, but also creates a new and important departure from hitherto settled principles which deserves full review by this Court.

In addition, the legislative history of the 1957 statute wholly negates any thesis that Congress intended or even contemplated that Indian tribal lands would be affected by the Niagara Power Project. That record shows not a single mention of the Tuscarora Nation and or its Reservation during the course of the Congressional hearings. The relevant Committee reports make not even the vaguest reference to the remotest possibility that Indian lands would be covered by the Project.[3] And the debates in the House and the Senate contain not one word about petitioner or its lands. 103 *Cong. Rec.* 11974-92, 12007-08, 13149-67. To find a legislative purpose to authorize the taking of petitioner's

---

[2] *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *United States* v. *Winans*, 198 U.S. 371, 380-81 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 198 (1919); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938); *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942).

[3] H. Rep. No. 862, 85th Cong., 1st Sess., 1957 U.S. Code Cong. & Admin. News, pp. 1585 *et seq.*; S. Rep. No. 339, 85th Cong., 1st Sess.

property on such a record is to distort the term "Congressional intent" beyond recognition.[4]

The importance of the ruling below as to when courts may find Congressional consent to the alienation of tribal lands is self-evident. (Indeed, respondent John W. Johnson is prosecuting an appeal to this Court under 28 U.S.C. § 1254(2) on the theory that the Court of Appeals unduly restricted the State of New York in exercising its sovereign right of eminent domain on Indian reservations.) If the decision is allowed to stand, the special statutory protections over Indian lands, which are so essential to the Federal Government's guardianship over Indian tribes throughout the United States, will be placed in jeopardy whenever Congress in general terms authorizes conduct which might eventually impinge upon such protections. That is reason enough for the assertion of this Court's full review powers.

---

[4] *Spalding* v. *Chandler*, 160 U.S. 394 (1896), cited by the court below, is not in point since this Court there found that Indian lands were "necessarily demanded" to effectuate a specific Congressional grant (160 U.S. at 406-07), whereas the Federal Power Commission found as a fact in this case that "other lands are available for reservoir use if the [Power Authority] is unable to acquire the Indian lands. . ." F.P.C. Order of January 30, 1958, p. 3.

CONCLUSION

The decision below is fraught with perils and uncertainties. It is a decision which undercuts and renders futile the review procedures established by Congress in the Federal Power Act. And it is a decision which creates a new and dangerous rule in the construction of statutes affecting Indians.

Because the court below has engaged in unwarranted guesswork as to the outcome of the pending license review proceedings in the Court of Appeals for the District of Columbia, it seems appropriate to vacate its judgment and direct the District Court to hold the matter in abeyance until the validity of the license has been finally determined. Once that issue has been resolved, the courts below can take appropriate action in the light thereof. If the Court of Appeals then persists in the ruling it has already announced, it will be time enough for this Court then to review the important question raised.

If the Court should feel otherwise about the appropriateness of the suggested remand, however, petitioner prays that a writ of certiorari now issue to review the judgment below on its merits.

Respectfully submitted,

ARTHUR LAZARUS, JR.
1700 K Stret, Northwest
Washington 6, D. C.
Attorney for Petitioner

Of Counsel

EUGENE GRESSMAN
1700 K Street, Northwest
Washington 6, D. C.

September 19, 1958

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 394—October Term, 1957.

(Argued July 10, 1958 — Decided July 24, 1958.)

Docket No. 25236

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Plaintiff-Appellant*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, *Defendants-Appellees-Cross Appellants*,

—and—

SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Defendant-Appellee*.

Before:

SWAN and MOORE, *Circuit Judges*, and
ANDERSON, *District Judge*.

Appeal from the United States District Court for the Western District of New York; Justin C. Morgan, *Judge*.

Tuscarora Nation of Indians, also known as Tuscarora Indian Nation, appeals from a judgment dismissing the complaint in an action against Power Authority of the State of New York, Robert Moses, and Superintendent of Public Works of the State of New York, John W. Johnson which sought: (1) a declaratory judgment declaring its rights and status; (2) a preliminary injunction against the

appropriation of plaintiff's land within the Tuscarora Reservation; (3) a temporary restraining order; (4) a permanent injunction; and (5) a judgment vacating and annulling all descriptions, maps, notices and other instruments purporting to appropriate plaintiff's property.

Power Authority of the State of New York appeals from that part of said judgment which orders that the affidavit of Henry S. Manley be stricken and only be considered as an additional brief.

Modified. Appeal by Power Authority affirmed.

ARTHUR LAZARUS, JR., Esq., Washington, D. C. (Strasser, Spiegelberg, Fried & Frank, New York, N. Y., on the brief) *for Plaintiff-Appellant.*

THOMAS F. MOORE, JR., Esq., New York, N. Y. (Samuel I. Rosenman, Henry S. Manley, John R. Davison, New York, N. Y., on the brief) *for Defendants-Appellees-Cross Appellants, Power Authority of the State of New York and Robert Moses.*

JULIUS L. SACKMAN, Associate Attorney, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York, Paxton Blair, Solicitor General, New York, N. Y., on the brief) *for Defendant-Appellee, Superintendent of Public Works of the State of New York, John W. Johnson.*

MOORE, *Circuit Judge*:

The appellant Tuscarora Nation of Indians (referred to as "Tuscarora") brought this action in the federal court under 28 U. S. C. A. 1331, 2201, and 2202: (1) for a declaratory judgment to the effect that the appellees, Power Authority of the State of New York, Robert Moses, and Superintendent of Public Works of the State of New York,

John W. Johnson, have no power to acquire a portion of their lands without the express consent of the United States and (2) for a permanent injunction against the appropriation of their lands without their consent.

The suit was commenced on April 19, 1958 in the Southern District of New York, and was later transferred (161 F. Supp. 702) to the Western District, where it was heard on the merits. The decision of June 24 (not yet reported) ordered (1) that the Power Authority's motion for a three judge court be denied; (2) that the temporary restraining order previously issued be dissolved; (3) that plaintiff's motion for a permanent injunction be denied; (4) that the complaint be dismissed without costs; and (5) that the affidavit of Henry S. Manley be stricken as an affidavit and be considered as an additional brief on behalf of the defendants. The appeal is taken pursuant to 28 U. S. C. A. 1291.

The Tuscarora are a tribe of American Indians occupying lands in western New York. They migrated to central New York State from North Carolina prior to the American Revolution and became a part of the Iroquois Confederacy, sometimes referred to as the Six Nations. Subsequent to the Revolution New York State desired to move the Oneidas and Tuscaroras from central New York to the territory of the Senecas in western New York. As a result of sales of the Indians' rights of occupation the main body of Tuscaroras moved to Niagara County where they acquired three tracts of property. The first tract, a mile square (640 acres), was a right of occupancy conceded to them by the Senecas. The second tract (1280 acres) was a gift from the Senecas and the Holland Land Company. The third and largest tract, and the only tract involved in this litigation, consists of 4329 acres. This third tract was acquired in 1804 (title finally taken in 1809) for the Tuscarora through the good offices of the Secretary of War of the United States. The Tuscarora purchased the fee to this tract from the Holland Land Company out of the proceeds received from the sale of their North Caro-

lina properties. Since that time the Tuscarora have lived on these tracts as a tax-exempt Indian Reservation despite the fact that the third tract was acquired by purchase and not as a grant from the United States.

The Power Authority of the State of New York is in charge of the development of a power project in western New York known as the Niagara River Power Project. This project was authorized by Congress and made possible by a treaty with Canada (February 27, 1950), which greatly enlarged the amount of water from the Niagara River available to the United States for power purposes. Following the treaty Congress through Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401) authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project with capacity to utilize all of the United States' share of the water permitted to be diverted under the terms of the treaty. The license was issued on January 30, 1958. On March 28, 1958 the Power Authority filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,383 acres of the Reservation lands of the Tuscarora Nation of Indians whose entire Reservation consisted of 6,249 acres. The portion sought to be condemned was planned to be used for a water storage reservoir in connection with the Niagara power project. On April 15, 1958 the Power Authority withdrew the condemnation proceedings in the Supreme Court of New York and by filing a map of the 1,383 acre portion of the Tuscarora Reservation pursuant to §30 of the New York State Highway Law and Article 5, Title 1 of the Public Authorities Law, appropriated the 1,383 acres for the purpose of the reservoir. At the same time a sum estimated by the Power Authority to be the fair market value of the appropriated land was, as required by Statute, deposited with the Comptroller of the State of New York. The provisions of §30 of the New York Highway Law authorize the Power Authority, after filing the

map and depositing the money, immediately to enter upon and take possession of the property described.

A power plant has been planned which will be the largest hydro-electric project in the United States. The total cost is estimated at upwards of $625,000,000 and contracts have already been authorized for more than $339,000,000. An essential part of the project is a large water storage reservoir of at least 600,000 acre feet. Construction work and power lines relocation are now at the very edge of the Tuscarora Reservation.

Although both parties have given the court the benefit of the historical development of title to Indian lands in New York State and the various treaties relating thereto, this background material affects largely tracts 1 and 2 which are not now before the court. Since tract 3 was acquired in fee by purchase the primary question is: What laws and treaties apply to, and what other obligations have been assumed by the United States and the State of New York with respect to, this particular Indian Reservation?

Appellant claims that the taking of a portion of its Reservation is in violation of Title 25, United States Code, Sections 177 and 233. Appellees, on the other hand, assert that these statutes do not apply to the State of New York which possesses sovereign power of condemnation over Indian lands, independent of and never surrendered to, the Federal Government, derived from its status as one of the original thirteen colonies.

Indian Non-Intercourse Acts: State and Federal

In order to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain, both New York and the United States from an early date imposed restrictions on the acquisition of lands from the Indians by private persons unless adequate protection was afforded. Thus in 1777 the first Constitution of New York

State provided that "no purchases shall be binding or deemed valid unless made under the authority and with the consent of the legislature of this State" (Article XXXVII). This provision, in substance, has been continued in subsequent constitutions.

In 1790 the United States enacted its first Indian Non-Intercourse Act which imposed a similar restriction against sale "unless the same shall be made and duly executed at some public treaty, held under the authority of the United States" (1 Stat. 138). A second Non-Intercourse Act was passed in 1793. Other acts embodying substantially the same restrictions were enacted but the statute remains in virtually the same form today. Thus 25 U. S. C. A. §177 provides:

> "*Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

Subsequent Laws and Decisions

As time passed the states were given more and more power to apply their laws in the Reservations of the Indians. Appellees refer to many cases, spread over a century and a half or more of dealings between the State of New York and the Indians within its boundaries, relative to Indian Reservations or tribal lands, reveal transfers in which parcels of land or interests therein, such as highways, easements for telephone lines and other takings short of the seizure of the whole or a substantial portion of such Reservations or tribal land, have been taken, granted or conveyed without special authorization by Congress and with the express, or at least tacit, acquiescence of the executive official of the United States chargeable with the responsibility for Indian affairs. A great majority of these cases have been in the State Courts of New York and two or three have been in the District Court of the United States. An examination of these cases discloses that between the earliest years of this Nation's existence and 1950, a large measure of social and economic intercourse relating to Indian tribal matters in the State of New York has been left to the State of New York through either the indifference or approval or express authorization of the federal executive officials who at a particular time had the responsibility for the care of the Indians. Despite this situation the Court of Appeals of New York has recognized that during all of this period, the Indians are and always have been, since the formation of this Government, the wards of the Nation and not of the States, and that the Federal Government has never relinquished its suzerainty over them.

In both criminal and civil fields Congress allowed the State laws to be extended onto the Reservations. However, in the act of September 13, 1950, 25 U. S. C. A. §233, granting to the courts of New York State jurisdiction in civil actions between Indians, there were specific excep-

tions, the first being that nothing therein contained shall be construed as subjecting the lands within Indian Reservations in the State of New York to taxation or subjecting them to execution on any judgment except a judgment by one tribal member against another as to use or possession of land; and second, "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Reservation in the State of New York; * * *." This second exception was made the subject of comment in the Report of the Joint Legislative Committee on Indian Affairs to the Legislature of the State of New York as follows:

> "Neither would the proposed law permit taxation or alienation of reservation land, although many Indians have been led to believe that these are the very ends the bills aim to accomplish.
>
> "Specific exclusion of the powers of taxation and disturbance of titles makes it clear that adoption of the bills would not end all Federal guardianship * * *."

The Power Authority's License

The Power Authority claims to have derived its authority from a license issued to it pursuant to Public Law 85-159, 71 Stat. 401 which authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project to utilize all of the United States' share of the water of the Niagara River permitted to be used by International agreement. Such a license was issued to the Power Authority although vigorously opposed by the Tuscarora. The Commission, however, did not pass on the eminent domain question because it expressly declared "The question of whether the Licensee is empowered to acquire Intervener's land in eminent domain proceedings is, in our view, a question to be resolved by a court of

competent jurisdiction. In any event, we are of the view that we are not required to render an advisory opinion on that question." A petition for review of the Commission's order is presently pending before the Court of Appeals for the District of Columbia.

Under §4(e) of the Federal Power Act, 16 U. S. C. A. §797, the Commission is authorized to issue licenses for the purpose of constructing reservoirs and power houses, etc., even "upon any part of the public lands and reservations of the United States" except that such a license "shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired and shall be subject to and contain such conditions as the Secretary of the Department of Interior under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization for such reservations; * * *."

The acquisition of property for the construction of reservoirs, etc., is implemented by §814 of the Federal Power Act which provides for the exercise by the licensee of the right of eminent domain. The section specifically provides for the manner in which this power may be exercised, namely, "It may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the state courts. * * *"

The United States Guardianship of Indian Rights

Over the last one hundred and fifty years there have been many court decisions relating to the rights of Indians. Although each case was decided on the facts which gave rise to the controversy, there has been uniform support for the doctrine that the Indian tribes are wards of the United States and that a general guardianship power is vested in the United States to protect them and their

property. This philosophy on the part of the courts has been expressed in various ways.

In the New York Court of Appeals, *People Ex Rel. Cusick* v. *Daly*, 212 N. Y. 183 (1914), the court, after referring to the Supreme Court's decision in the *Kagama* case (*United States* v. *Kagama*, 118 U. S. 375 (1886)), which stressed the fact that the Reservation had been set apart by the United States said: "But these were not the controlling elements in the decision, as will be seen from a perusal of the whole opinion, for the power of the Federal authorities was asserted primarily because the Indian tribes in this country were, and always had been since the formation of the government, the wards of the nation and not of the states." This case dealt specifically with the Tuscarora Indians. The court traced their history from their North Carolina days to their final Reservation in Niagara County, saying: "Interesting as these facts may be to the student of history, they have little bearing upon the question to be decided. The truth is that we are dealing with dual relations growing out of peculiar conditions. The state of New York has enacted laws conferring upon these Indian tribes certain powers to regulate their own affairs, and to protect their lands from invasion (see Indian Law, Cons. Laws, Ch. 26), but the Federal government has never relinquished its suzerainty over them." The court further held that there was "no less reason for placing them [the New York Indians] under the protectorate of the Federal government than there was for extending it to the other tribes resident in any of the original thirteen colonies" (p. 192). The court continued "Congress has continued to act upon the theory that it has jurisdiction of our New York Indian tribes no less than of their brethren in the west" (p. 193). The conclusion of the court was that "From this confusing history of Federal and state legislation and judicial decisions upon matters affecting the relations of our governments to the Indians,

it will be seen that the question is not free from doubt, but there are a few considerations which incline us to the view that the Federal jurisdiction must prevail" (p. 196).

The *Cusick* case was followed by *Mulkins* v. *Snow*, 232 N. Y. 47, in which the court said "They [the Indians] are the wards of the nation and Congress has full authority to legislate for them within their reservation. (*People ex rel. Cusick* v. *Daly*, 212 N. Y. 183). When the state of New York legislates in relation to their affairs, its action is subject to the paramount authority of the federal government" (p. 51).

In the Supreme Court of the United States this guardianship has been frequently restated. It was described in the *Kagama* case, *supra*, as follows:

> "* * * These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen."

In *United States* v. *Candelaria*, 271 U. S. 432, 439, the court said:

> "'Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, *whether within*

its original territory or territory subsequently acquired, and whether within or without the limits of State * * *' It is for that body [Congress] and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.' "

Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U. S. C. A. §233, pointed up and reaffirmed its paramount authority over Indian tribal lands.

The primary question now to be decided is whether sections 177 and 233 of Title 25 U. S. C. A. prohibit the taking of any portion of the lands of the Tuscarora or whether the general power of the sovereign, namely, the United States, to take the lands of any of its subjects for appropriate public purposes, provided just compensation is paid, is paramount and impliedly written into all statutes affecting property.

A secondary question is, assuming that power of eminent domain exists, has it been exercised by the proper authority and in the manner prescribed by law?

Were the lands in question owned by citizens other than Indians, there would be no question but that the power of eminent domain could be exercised for the purposes of the power project. To create an exception it must be found that the Indians occupy some special status which renders them immune from the application of this principle. For many years their Reservations have been specially protected by law. They have practiced their own tribal customs and enjoyed their own way of life without too much outside interference. The present appropriation calls for the destruction of approximately one-third of the entire

Reservation embraced within tract number 3. Unless there is some over-riding need or equity in others, the situation would seem to call for the exercise of that guardianship protection which the United States has asserted and exerted over the years.

On the other hand, as years go by there has been conscious effort to assimilate the Indians into the communities in which they live and to extend to them the same equal protection of the laws as all other citizens enjoy. This view is well exemplified in the Senate Report which preceded the passage of the civil jurisdiction bill in 1950 in which it was said that:

> "Your committee believes that all citizens of a State should be parts of one social order; that anything which conflicts with this principle should be brought into conformity therewith at the earliest time consistent with justice; that the civil relationship and responsibility of all citizens within a State should be equal as well as just and under the jurisdiction of a common code of laws that govern all and protect all alike." (Sen. Rep. No. 1836, June 15, 1950.)

If the Indians are to enjoy equal protection of the laws and all the other benefits extended to each citizen it may well be that they should bear some of the burdens including that of being subjected to having their lands condemned for public purposes, beneficial to the State in which they live.

The sovereign power of the United States is exercised by Congress and it would be anomalous indeed if this very power which could make its own land subject to condemnation (16 U. S. C. A. section 797) could not be extended to the land of those over whom it exercises its guardianship. This power has been asserted from time to time as, for example, in the Reclamation Acts, the appropriation of vast areas in the mid-west for irrigation and other public

projects. In *Henkel* v. *United States*, 237 U. S. 43, 49, 50, the Supreme Court said:

> "The authority of the Congress of the United States to devote these lands to irrigation purposes is unquestioned. As a matter of fact, it might, if it saw fit, remove the Indians therefrom and devote the land to such uses. Recognizing the injustice of arbitrary appropriations to other uses, no effort has been made to take these lands without compensation to the Indians for the improvements which they have made, and they have been given the right to select other lands in place of those released. The reclamation projects undertaken by the Government are very extensive, and cover many States; and they must involve in their construction, the flooding of lands in connection with dams designed to hold water for such purposes; and must necessarily include much territory which is included in Indian reservations. This situation was of course well known to Congress when it passed the Reclamation Act, and we cannot doubt, in view of the broad authority conferred by §§ VII and X above quoted, that it was the purpose of Congress to give the Secretary of the Interior the right to acquire such rights as are here involved, when necessary for reclamation purposes. In carrying out the purposes of the act, the Secretary of the Interior is authorized to acquire any rights or property necessary for that purpose, and to acquire the same, either by purchase or by condemnation. He is specifically authorized to perform any and all acts necessary and proper for the purpose of carrying into effect the provisions of the act. Authority could hardly have been conferred in more comprehensive terms, and we do not believe it was the intention of Congress, because of the Indians' right of selection of lands under the circumstances here shown, to reserve such lands from the operation of the act. To do so might defeat the recla-

mation projects which it was evidently the purpose of Congress to authorize and promote. * * *".

The power of condemnation was also recognized in the passage of section 409(a) Title 25 U. S. C. A. which provides that "Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, * * *" the proceeds therefrom may with the approval of the Secretary of the Interior be reinvested in other lands selected by the Indians and shall become restricted as to alienation and taxability as the lands condemned.

The court below came to the conclusion that "There is no constitutional requirement that the appropriation now involved be specifically authorized by an act of Congress" and that neither sections 177 nor 233 of Title 25 U. S. C. A. presented any bar to the exercise of eminent domain. The wording of these two statutes does not, in our opinion, lead to such a conclusion. However, the same result is reached because the right of eminent domain of the United States is superior to, and could not have been extinguished by, the statutes in question. Of necessity, however, the exercise of this power must be by the United States through Congress.

This power may be found in the direction given to the Federal Power Commission to issue a license to the Power Authority (71 Stat. 401) and the right granted to a licensee to use the right of eminent domain. Appellant challenges this approach by arguing (1) that the Federal Power Commission cannot thus usurp the authority of Congress and (2) that any taking of Tuscarora property must be by special enactment directed to Tuscarora land. General acts, the Tuscarora say, will not suffice.

There is no question that Congress has the constitutional authority to take Indian Reservation or tribal lands by eminent domain. *Cherokee National* v. *Southern Kansas Ry. Co.*, 135 U. S. 641. There remain to be determined whether in delegating its power of condemnation to the Power Authority, Congress expressly or impliedly intended to authorize the taking of Indian Reservation or tribal lands (as distinct from lands allotted to Indians in severalty, 2 U. S. C. A. 357); and whether in the course of its condemnation procedure the Power Authority complied with the pertinent provisions of the Federal Power Act.

Congress did not expressly authorize the taking of the appellant's land for the Niagara Power Project. Can it be inferred from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation that Congress intended to authorize such a taking? *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co. et al.*, 195 U. S. 540; *Spaulding* v. *Chandler*, 160 U. S. 394 (1895); *Seneca Nation of Indians* v. *Brucker*, U. S. District Court, District of Columbia, Civil No. 2202-57, dated March 24, 1958 (unreported), and cases cited therein. Such an inference may properly be drawn when consideration is given to the size and extent of the Niagara Power Project.

The electric plant will have a capacity of 2,190,000 kilowatts, the largest hydroelectric plant in the United States, and will produce annually some 13,000,000,000 kilowatt hours of energy. To accomplish this result a large storage reservoir is essential for the efficient use of the available water supply.

The legislative history of the Niagara River Hydroelectric Power Project, 85th Congress, First Session, 1957, Vol. 2, U. S. Congressional and Administrative News, pages 585, *et seq.*, shows that in the hearing before both

Houses of Congress, the redevelopment plan contemplated "a pump-storage plant at the top of Niagara escarpment 0.8 mile east of Lewiston, where water would be pumped during the night hours to a reservoir with surface area of 850 acres * * *." While this acreage is less than that now sought to be taken, it may be assumed that Congress had general knowledge of the terrain and the pertinent area and that appellant's Reservation was in the vicinity and likely to be taken in part for the purposes of the project.

The direction to the Federal Power Commission was specific, namely, "to issue a license to the Power Authority of the State of New York for the construction and operation of a power project with capacity to utilize all of the United States share of the water of the Niagara Power permitted to be used by International agreement." The licensee by virtue of section 814 becomes vested with the governmental power of eminent domain. The exercise of the right is thus the act of an agency of the sovereign. But just as the grant is given by Congress it should be exercised in the manner prescribed by Congress which is either in the district court where the property is located or in the state courts. The appellees, although they started their condemnation proceedings in the State court, chose to abandon that method and proceeded under New York Public Authorities Law (specifically passed in 1958) and the New York Condemnation Law giving the Power Authority the right to proceed by appropriation under section 30 of the New York Highway Law. If Congress had intended this procedure to be followed, section 814 instead of providing "in the state courts" would have to read "or in such manner as may be prescribed by the legislature of the state in which the property is located." The specific 1958 legislation dealing with the Niagara River project enables the Power Authority to move in, appropriate the land and remove the owner before he has had a chance to have a judicial hearing. If Congress

wishes this to be the method of eviction it should at least so declare in specific terms.

The final question is, what relief should be granted? The construction workers are on the borders of the Reservation ready to install power lines and cover the land with fill for the reservoir dikes. Nevertheless, aggressive construction activity should not be sufficient to nullify the protective policy of the Government towards the Indians or the laws calculated to enforce that policy. The Congressional concern, exhibited as recently as 1950, to except the two elements most carefully guarded by the Government, namely, tax exemption and alienation, from transfer to the civil jurisdictional powers of the State of New York is ample evidence that "guardianship" still exists. If the Indians are no longer to be the wards of the United States such a change should be by Congressional enactment and not by court decision.

The court below dismissed the complaint thus preventing any relief by way of declaration of rights. This portion of the judgment should be reversed. Since the complaint seeks a declaration of rights we hold that the Power Authority of the State of New York as a licensee of the Federal Power Commission directed to issue a license pursuant to Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401) is authorized to exercise the right of eminent domain according to the procedures specified in section 814 of the Federal Power Act (16 U. S. C. A. section 814).

Pending the final determination of this action or any proceeding seeking to acquire the property in question, appellees are stayed from entering upon or damaging lands within the Tuscarora Reservation except that appellees shall have the right to conduct, and continue with, such activities on said property as have been excluded from the stays heretofore entered as amended from time to time.

The proceedings taken to appropriate the property in question by the filing of maps, notices or other documents pursuant to the Highway Law and the Public Authorities Law of the State of New York are vacated and annulled.

The District Court, in the event that the Power Authority desires to exercise its right of eminent domain in that court, is requested to expedite all proceedings as much as possible.

Insofar as the judgment appealed from dismisses the complaint and denies a stay it is reversed.

Insofar as the decision below holds that the Power Authority has the right to exercise eminent domain it is affirmed.

The cross-appeal with reference to the affidavit of Henry S. Manley is affirmed. It is sufficient that the material therein contained be received within the limitations fixed by the court below.

The judgment should be modified in accordance with this opinion. No costs.

SWAN, *Circuit Judge* (dissenting):

I disagree with the majority opinion only in its holding that condemnation by appropriation pursuant to the state statutes is not permissible under §21 of the Federal Power Act and the license issued by the Commission. In my opinion the judgment should be affirmed. The reasons which have led me to this conclusion have not been persuasive to my brothers, and I refrain from stating them here in order to avoid delaying the decision of the court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 394—October Term, 1957

(Submitted August 6, 1958 Decided August 26, 1958)

Docket No. 25236

TUSCARORA NATION OF INDIANS, *Plaintiff-Appellant*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *et al.*, *Defendant-Appellees*.

Before:

SWAN and MOORE, *Circuit Judges* and
ANDERSON, *District Judge*.

On petition by appellant for rehearing; and motion by appellees for clarification or modification of the stay provisions of this court's judgment of July 24, 1958.

ARTHUR LAZARUS, JR., STRASSER, SPIEGELBERG, FRIED & FRANK, Washington, D. C., *Counsel for Appellant*. Of Counsel: Daniel M. Singer.

THOMAS F. MOORE, JR., *Attorney for Appellees*.

PER CURIAM:

The petition for rehearing is denied, and it is ordered that the mandate shall be issued six days after the date hereof.

Upon issuance of the mandate, the stay granted in the opinion of this court "pending final determination of this action" will cease. Consequently after issuance of the mandate the answer to each of the three questions raised in the motion for clarification is "No."

August 26, 1958

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil Action No. 7844

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION, *Plaintiff*

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON, *Defendants*

STRASSER, SPIEGELBERG, FRIED & FRANK (Arthur Lazarus Jr., Esq., of counsel), New York, New York, Attorneys for Plaintiff

THOMAS F. MOORE, JR., Esq., New York, New York, Attorney for Defendants Power Authority of the State of New York and Robert Moses

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (Julius L. Sackman, Esq., of counsel), Albany, New York, Attorney for Defendant John W. Johnson

---

The complaint in this action was filed in the Southern District of New York on April 19, 1958. The action is one for declaratory judgment, wherein the plaintiff prays

(1) That it have a judgment and decree of this court defining its rights and status therein, particularly adjudicating that neither of the defendants, nor any of them, had any right, authority or power to acquire, or attempt to acquire, by appropriation or otherwise, any or all of the lands belonging to plaintiff within the Tuscarora Reservation;

(2) That a temporary restraining order be granted restraining and enjoining the defendants and each of them and their agents, servants, employees and attorneys, and all persons in active concert and participation with them, from entering upon, or taking any action with regard to any appropriation of land belonging to the plaintiff within the Tuscarora Reservation;

(3) That a permanent injunction permanently granting the relief sought by the temporary restraining order be granted;

(4) That this court set aside, vacate and annul all descriptions, maps, notices and other instruments in connection with the purported appropriation.

The complaint alleges that plaintiff is a recognized tribe of American Indians residing on the Tuscarora Reservation in Niagara County, New York. The complaint further alleges the existence of an actual controversy "which is definite, concrete, real and substantial, which involves and affects the legal relations of plaintiff and defendants, and vitally affects the public interest." This action is brought under Sections 2201 and 2202, Title 28 U.S.C. and the complaint alleges jurisdiction by reason of Title 28 U.S.C., Section 1331. The plaintiff claims relief under Article I, Section 8, of the Federal Constitution, authorizing Congress to regulate commerce with the Indian tribes, and Treaties of October 22, 1784,[1] 7 Stat. 15, and

[1] Treaty between the United States and the Six Nations concluded at Fort Stanwix in 1784 and proclaimed October 22, 1784. 7 Stat. 15.

November 11, 1794,[2] 7 Stat. 44, entered into by the United States and the Six Nations of Indians including plaintiff, and R. S. Section 2116, 25 U.S.C. 177, and the Act of September 13, 1950, 25 U.S.C. 233, relating to the alienation of Indian lands.

The defendant Power Authority of the State of New York is a corporate instrumentality and a subdivision of the State of New York. The defendant Robert Moses is the Chairman of the Power Authority of the State of New York and the defendant John W. Johnson is the duly appointed and acting Superintendent of Public Works of the State of New York.

It further appears that Averell Harriman, Governor of the State of New York, on April 11, 1958 signed into law Chapter 646 of the Laws of 1958, amending paragraph 1 of Section 1007(10) of the Public Authorities Law, as follows:

> "The Authority may determine what real property is reasonably necessary for the improvement and development of the Niagara River or the International Rapids section of the St. Lawrence River. If funds are made available by the Authority to the State for payment of the cost and expense of the acquisition thereof, the Superintendent of Public Works, when requested by the Authority, shall acquire such real property in the name of the State by appropriation and, where necessary, remove the owner or occupant thereof and obtain possession, according to the procedure provided by Sec. 30 of the Highway Law, insofar as the same may be applicable. The Authority shall have the right to possess and use for its corporate purposes, so long as its corporate existence shall

[2] Treaty between the United States and the Six Nations concluded at Canandaigua in 1794 and proclaimed January 21, 1795. 7 Stat. 44.

continue, all such real property and rights in real property so acquired."

Acting under the amendment provided by Chapter 646 of the Laws of 1958 of the State of New York as above indicated, the Power Authority of the State of New York obtained, after a long and at times bitter contest before the Congress of the United States, the status of a licensee of the Federal Power Commission, an agency of the United States Congress, to which the latter had delegated its authority concerning water power and hydroelectric development. While this debate in the Congress of the United States was proceeding as to what agency, if any, would be the representative of the United States following its treaty with the Dominion of Canada in 1950, the Dominion of Canada proceeded immediately, and has created, and is now utilizing, a very modern and most valuable hydroelectric power system, the turbines of which generate power and have for some years past; parenthetically, following the destruction of the Niagara Mohawk plant (formerly the Niagara Power Company) on the American shore of the Niagara River, negotiations were entered into resulting in sale by the Dominion of Canada to the United States of power from this very new equipment. Thus, in the final legislation by the Congress, empowering the Power Authority of New York to proceed as a licensee of the Federal Power Commission, and in the State of New York legislation of 1958, germane to the issue of power, time was shown to be most important.

The plaintiff claims that the Power Authority, in its attempt to occupy lands of the plaintiff, is offending federal treaties and statutes and that the defendants have not requested, nor has the Congress of the United States granted, permission to acquire lands belonging to plaintiff. The plaintiff further alleges that the 1300 acres of land within the Tuscarora Reservation which defendants

have purported to appropriate is of a unique character to plaintiff; in that it has been occupied by the Tuscarora Nation for over 150 years; and is land upon which they hope and intend to live in the future. Plaintiff further alleges that in the event that an area of the Reservation is taken, it cannot acquire by purchase similar contiguous land by using the proceeds from the lands taken "since any newly acquired lands would not be part of plaintiff's community and would be alien to plaintiff's customs, traditions and history."

This is a novel argument in view of the fact that the 1300 acres was purchased by the antecedents of those constituting the Tribe of Tuscarora Indians with moneys obtained from the sale of lands originally owned by this Tribe in North Carolina. The plaintiff further contends that the unique character of the land on the reservation is in sharp contrast to all alternative land available to the defendants outside the reservation. This is of no avail, as many cases have determined this to be a legislative and not a judicial question.

A great deal of historical and legal material respecting Indian lands generally, and the land of this plaintiff in particular, has been submitted by the parties. The reservation of this plaintiff appears to be unique among Indian lands in New York. The records indicate that a few Tuscaroras settled at or near the present reservation as early as 1780,[2a] but the tribe does not appear to have acquired legal title to the present reservation lands until some 20 to 30 years later, between 1800 and 1810. In addition, none of plaintiff's land was ceded or allotted to it either by the United States or the State of New York. The land was acquired in three parcels, to wit: one parcel

---

[2a] Turner, *The Pioneer History of the Holland Purchase of Western New York* (Buffalo: Geo. H. Derby & Co., 1849), pp. 182-3.

acquired by deed from the Seneca Nation;[3] a second parcel acquired by grant from the Holland Land Co.; and the third parcel acquired by purchase from the Holland Land Co.[4] It is from this third parcel of 4329 acres that defendant Power Authority wishes to take approximately 1300 acres of land to construct a reservoir. There is no dispute among the parties concerning the way in which plaintiff acquired the disputed tract.

Plaintiff claims the protection of the Treaties of Fort Stanwix, signed October 22, 1784, and the Pickering Treaty, signed November 11, 1794. In these treaties, the United States guaranteed the Six Nations peaceful possession of the land upon which they were settled. While these guarantees might conceivably apply to parts of parcel one or two, since some Tuscaroras appear to have settled therein between 1780 and 1795 even though title was not acquired until after 1800, they cannot apply to tract three, since the tribe did not settle therein until some time after 1804 and did not acquire title until 1809. It is not reasonable to interpret either treaty, in the absence of specific language so providing, to apply the guarantees contained therein to after-acquired lands. While such an interpretation might reasonably be made where the United States had ceded or alloted the after-acquired lands to plaintiff, such a result could never obtain where the after-acquired lands were purchased by plaintiff. In the latter eventuality, the only limit on the size of plaintiff's reservation would be the extent of its ability to purchase additional land. Certainly, it is not reasonable to assume that

---

[3] Deed of Conveyance of 640 acres from Seneca Indians to Tuscarora Indians dated March 30, 1808, recorded in Liber 151, Pages 168-169, Niagara County Clerk's Office, Lockport, New York.

[4] Deed of Conveyance of 4,329 acres from Henry Dearborn Secretary of the War Department to Tuscarora Indians dated January 2, 1809, recorded in Liber A, Page 5, Niagara County Clerk's Office, Lockport, New York.

any of the parties to the treaties relied on by plaintiff had this result in mind.

The character of plaintiff's interest in the disputed land, and the location and control of the fee in that land, raises a two pronged problem. The first concerns the history of the specific fee involved, and the second, as mentioned previously, concerns the character of the fee in Indian lands generally.

The area in which plaintiff's land is located, originally came under the dominion of the British Crown. The area was granted to the colony of Massachusetts under a charter issued by King Charles I.[5] Apparently, the same area was granted to the colony of New York under a charter issued by King Charles II.[6] Following the signing of the peace treaty between the United States and Great Britain, which terminated the Revolutionary War, a dispute arose between the newly independent states of New York and Massachusetts as to ownership and control of the area, including plaintiff's reservation. The dispute was settled by the so-called "Hartford Compact of 1786",[7] by which the two states agreed that New York would have governmental control over what is now Western New York. The parties agreed inter alia to the drawing of a line running north-south from Lake Ontario along the westerly shore of Seneca Lake to the present New York-Pennsylvania border. East of this line, New York was recognized as having the pre-emption right in the land. West of this line, the same right was vested in Massachusetts. In

[5] The Charter of the Colony of Massachusetts Bay in New England, 1628-9 (N.Y. Leg. Doc. No. 51, 1889, pp. 94-100).

[6] Grant from the King of England to the Duke of York, dated March 12, 1664 (N.Y. Leg. Doc. No. 51, 1889, pp. 100-104).

[7] Hartford Compact between New York and Massachusetts concluded December 16, 1786, recorded in Liber 1, pages 270-280 of Miscellaneous Records in the Cattaraugus County Clerk's Office, Little Valley, New York (N.Y. Leg. Doc. No. 51, 1889, pp. 105-111).

1791 and 1792, Massachusetts, pursuant to the Hartford Compact, sold to Robert Morris all of its right title and interest, including "the right of pre-emption of the soil from the native Indians", to the area west of a line running generally north-south from Lake Ontario through Genesco to the New York-Pennsylvania border.[8] Morris then conveyed all of his right, title and interest in these lands to the Holland Land Company.[9] The deeds involved in effect required Morris to extinguish the Indian right of occupancy in the lands concerned, as a result of his covenant to remove all encumbrances. Pursuant to this covenant in 1797, Robert Morris entered into an agreement at Genesco, the so-called "Treaty of Big Tree",[10] at which the Seneca Nation transferred all of its right, title and interest to Morris for a valuable consideration. The agree-

---

[8] Deed of Conveyance from the State of Massachusetts to Robert Morris dated May 11, 1791 (N.Y. Leg. Doc. No. 51, 1889, pp. 112-114).

Release and Conveyance by the State of Massachusetts to Robert Morris dated June 20, 1792 (N.Y. Leg. Doc. No. 51, 1889, pp. 115-116).

[9] Deed of Conveyance from Robert Morris to Herman LeRoy and John Lincklaen, agents for the "Holland Land Company", dated December 24, 1792 (N.Y. Leg. Doc. No. 51, 1889, pp. 117-120).

Deed of Conveyance from Robert Morris to Herman LeRoy, John Lincklaen and Gerrit Boon, agents for the "Holland Land Company", dated February 27, 1793 (N.Y. Leg. Doc. No. 51, 1889, pp. 121-123).

Deed of Conveyance from Robert Morris to Herman LeRoy, William Bayard and Matthew Clarkson, agents for the "Holland Land Company", dated July 20, 1793 (N.Y. Leg. Doc. No. 51, 1889, pp. 124-127).

Deed of Conveyance from Robert Morris to Herman LeRoy, John Lincklaen and Gerrit Boon, agents for the "Holland Land Company", dated July 20, 1793 (N.Y. Leg. Doc. No. 51, 1889, pp. 128-130).

[10] Agreement concluded between Robert Morris and the Seneca Indians at Big Tree (Genesco, New York) September 15, 1797 (N.Y. Leg. Doc. No. 51, 1889, pp. 131-134).

ment specifically reserved ten tracts of land to the Indians, not including any part of plaintiff's reservation. Some question has been raised as to whether or not the Seneca grant was left out of the treaty by inadvertence, as in the case of the Oil Springs Reservation, so that original title remained in the Seneca Nation.[11] It should be noted that a United States Commissioner, one Jeremiah Wadsworth, was present at the making of the agreement, as a result of which the United States appears to have acquiesced to the agreement. As a result of the treaty of "Big Tree", it appears that the deed of the Seneca Nation to the Tuscarora of 640 acres in 1808 was a nullity in that the Senecas had nothing to convey. The transfer was never objected to by the Holland Land Company, its successors or assigns. It might be noted that, in correspondence between Joseph Ellicott and Theop. Cazenove, both officers of the Holland Land Company, an intention was expressed to confirm the Seneca grant, but to reserve to the Holland Land Company the pre-emptive right.[12] No

A a result of the above, assuming the Seneca Nation possessed the right of original Indian occupancy, and no reason appears for assuming that the truth is otherwise, the original right of Indian occupancy and the pre-emptive right in the lands now occupied by plaintiff were actually extinguished by the treaty of "Big Tree". Some question might be raised as to whether or not this is so with regard to the Seneca grant on a formal basis, in view of the 1810 conveyance by the Holland Land Company of its pre-emptive rights in 1920 acres in the Tuscarora Reserva- formal action was taken in this regard until the company's conveyance in 1810 to David Ogden.

---

[11] Royce, *Indian Land Cessions*, 18th Annual Report of the Bureau of American Ethnology, Part 2 (Washington: Government Printing Office, 1899), p. 773.

[12] Letter from Theophilus Cazenove to Joseph Ellicott, dated May 10, 1798 (32 Buffalo Historical Society Publication, pp. 21-30).

tion to David Ogden,[13] this acreage being equivalent to the Seneca grant and the Holland grant to the Tuscarora Reservation combined. This interest was later conveyed by the Ogden Land Company to others[14] in 1821, and presumably resides at present in the heirs or assigns of the said grantees. There does not appear to have been a conveyance of the pre-emptive right as such in the Tuscarora purchase subsequent to the treaty of "Big Tree." In any event, the present title to all of the land of plaintiff was acquired from grantees of the sovereign who possessed the pre-emptive right, and who had previously extinguished the original right of Indian occupancy. This right, once having been extinguished, could not be revived, even if title was thereafter acquired by those who originally possessed that right. The obvious policy of the sovereign was to extinguish the original Indian title to all but reserved Indian lands. Original Indian title was viewed as an encumbrance on land, rather than a legitimate general interest, since it could be held only by the original Indian tribes and it was the intention of the sovereign that Indians should be confined to specific tracts, and the state generally opened to white settlement. In view of this policy, it cannot be argued that original Indian title can in any manner be revived once it has been extinguished. Plaintiff here, of course, historically did not possess original Indian title in the lands which they now occupy. They hold title by deed and not by original right of Indian occupancy.

The foregoing is as brief a sketch as possible of the title to the specific land at issue. However, to determine

---

[13] Deed of Conveyance from Holland Land Company to David A. Ogden, dated September 12, 1810, recorded at No. 1 of Deeds, page 68, Erie County Clerk's Office, Buffalo, New York.

[14] Deed of Conveyance from David Ogden to Robert Troup and others dated February 21, 1821, recorded in Liber One of Deeds at pp. 102-110, Cattaraugus County Clerk's Office, Little Valley, New York (N.Y. Leg. Doc. No. 51, 1889, pp. 172-181).

exactly what interest the plaintiff acquired when it acquired title, we must look to the general law regarding Indian lands. The basic statement of the legal character of such lands is to be found in the landmark opinion of Chief Justice John Marshall in *Johnson* v. *McIntosh*, 21 U.S. 542 at 583. The effect of this decision, which has been uniformly followed since its issuance in 1823, is to confirm in the Indian tribes merely a "right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." In the earlier case of *Fletcher* v. *Peck*, 10 U.S. 87, Chief Justice Marshall said, with respect to lands within another of the thirteen colonies, to wit, Georgia, that the question whether vacant lands within the United States were joint property or belonged to the separate states had been compromised; that since the vacant land at issue therein was within the State of Georgia, that state had the power to grant it; and finally, that the nature of Indian title was such as not to be inconsistent with seizin in fee on the part of the state.

The reasoning found in the *Johnson* and *Fletcher* cases forms the basis for the view that in the thirteen original colonies the fee to all land within the state passed directly from the Crown to the sovereign state following the revolution; that the United States never had title to such lands, and that as the Indians had at best a mere right of occupancy, the fee to their lands resided in the state. This status is in contrast to that of all lands, and particularly Indian lands, outside the original thirteen colonies, which were federally owned before being divided into sovereign states. This view is succinctly set forth in *Seneca Nation of Indians* v. *Appleby*, 112 N.Y.S. 177 at 188-89, reversed on other grounds at 196 N.Y. 318; in *Seneca Nation* v. *Christie*, 126 N.Y. 122; *Jones Cut Stone* v. *State*, 166 N.Y.S. 2d 742, and in several reports and opinions of Congressional Committees and Attorneys General. See a report on the background and status of the New York

Indians submitted to the Speaker of the House of Representatives by the Department of the Interior on January 4, 1954.[15] See also *Dixon* v. *State*, 155 N.Y.S. 2d 723 and *St. Regis* v. *State*, 158 N.Y.S. 2d 540,, reversed on other grounds at 168 N.Y.S. 2d 894. Collateral support for this view is also found in the rules of law, basic in New York since the time of its inception, that original and ultimate property to all lands within the jurisdiction of the state resides in the people thereof (reflected today in New York Constitution, Art. I, Sec. 10); and that no sale of Indian lands may be made without legislative consent (N.Y. Const. Art I, Sec. 13). When Section 1007, Public Authorities Law of New York State was amended, a statement from the floor during the debate contained a direct quote showing knowledge by the Legislature that plaintiff's lands were involved. In view of this, the Legislature must be presumed to have consented to the taking. Even if this were not so, there appears to be authority for such a taking, irrespective of legislative approval. See *St. Regis* v. *State*, 168 N.Y.S. 2d 894 at 898-899.

As a result of the character of Indian title in New York, the provision of the Pickering Treaty which, if applicable, would apparently limit grantees of the Six Nations to "the people of the United States" (Art. 3), could not refer to the Federal Government only, since the Federal Government never possessed the fee or the pre-emptive right in New York Indian lands. Indeed, the Supreme Court, in The New York Indians, 72 U.S. 761, interpreted that treaty as meaning that the Indians could sell only to the party possessed of the right of pre-emption, although this had to be done with the consent of the government. The treaty of "Big Tree", which extinguished the Indians' original right to possession in the land in

---

[15] Report entitled "Background Data on Indians of New York" transmitted by Assistant Secretary of the Interior Orme Lewis to the Speaker of the House of Representatives, January 4, 1954. Plaintiff's Exhibit 7.

issue, was acquiesced in by the United States. For this reason, that treaty also complied with the requirements of the first "Indian Non-Intercourse Act"[16] (1 Stat. 138), and also with the second "Non-Intercourse Act"[17] (1 Stat. 330). Furthermore, the character of the title to Indian lands in New York explains the holding in *Seneca Nation* v. *Christie*, supra, that New York had the power to make treaties with New York Indians for the purchase of their lands; and the holding in *United States* v. *Franklin County*, 50 F. Supp. 152, that the absence of a United States Commissioner at the making of such a treaty would not invalidate it. The character of that title also affords the basis for the holding that Indians in New York are wards of the State, and that fee to their lands resides in the State, as found in *Seneca Nation* v. *Christie*, supra; *Dixon* v. *State*, supra, and other decisions. In New York ex rel. Ray v. Martin, 326 U.S. 496 (1946), the most recent decision of the Supreme Court on the subject of the peculiar status of the New York Indian, it was held, at page 499, that the power of Congress to regulate commerce with the Indian tribes, derived under the same clause of the Constitution with the power to regulate interstate commerce, is of a similar nature, the court saying, "In the absence of a limiting treaty obligation or Congressional enactment, each state had a right to exercise jurisdiction over Indian reservations within its boundaries." Finally, there are innumerable examples of the extinguishment of Indian title in New York, some involving plaintiff's land, in which the United States took no part.[18] The state has, for ex-

---

[16] Indian Non-Intercourse Act, July 22, 1790. 1 Stat. 138.

[17] Indian Non-Intercourse Act, March 1, 1793. 1 Stat. 330.

[18] Agreement between New York Telephone Company and Niagara Mohawk Power Corporation and Chief Harry Patterson, March 1, 1951. Defendant Power Authority Appendix, pp. 122a-123a.

Agreement between Niagara Mohawk Power Corporation and Harry Patterson, March 17, 1958. Defendant Power Authority Appendix, pp. 124a-125a.

ample, long exercised the power of eminent domain over Indian lands for highway and related projects. *Wadsworth* v. *Buffalo Hydraulic Assn.*, 16 Barb. 83.

As a result of the foregoing, it is clear that the disposition of the pre-emptive rights by Massachusetts to Robert Morris was proper; that Morris' extinguishment of the original Indian right to possession conformed with applicable Federal law, that plaintiff does not now, and never did, possess that right in the lands in dispute. Whatever interest the United States has in the New York Indians is directed not to Indian lands as such, but to something more vague and general, such as their general welfare.[19] In any event, it is not directed to the land in dispute, which was given reservation tatus by the New York Legislature, not by the United States.

The character of the interest of the United States effectively refutes the contention by plaintiff's attorney that since the Bureau of Indian Affairs had to approve his contract with plaintiff,[20] that the Congress therefore

---

[19] Letter from Fred G. Aandahl, Assistant Secretary of the Interior to Henry Patterson, member of Council of Tuscarora Nation and owner by allotment of 500 acres of land declining under date of November 1, 1957 to aid the Tuscarora Nation in opposing the Authority's application then pending before the Federal Power Commission.

Order of Federal Power Commission—"As your reservation lands are under State jurisdiction this department is not in a position to present your case for you." This sentence was quoted by the Federal Power Commission in its order issued March 21, 1958, which denied the application of the Tuscarora Nation for a rehearing on its objection to the licensing of the Niagara project because the reservoir is to be located on part of its land.

Plaintiff's exhibit 10; Power Authority Appendix p. 149a. See also Report of Department of Interior, Plaintiff's exhibit 7 supra, and Plaintiff's exhibits 9A, 9B and 9C.

[20] Letter from Assistant Commissioner of the Bureau of Indian Affairs, Department of the Interior, to Messrs. Strasser, Spiegel-

intended to retain control over plaintiff's land. Control of the specific matter of attorneys' contracts is not at all consistent with the absence of exercise of Federal control over New York Indian lands.

Plaintiff's land is unique among Indian lands in New York, having been purchased, rather than granted or ceded by the government. Plaintiff holds record title to the lands in dispute, but the effect of that title has not been determined. The act of the Legislature in 1821, after several petitions by plaintiff, permitted plaintiff to hold its land nationally and extended to it a tax-free status, and other protections constituting reservation status. It may be claimed that this had the effect of vesting the fee in the state in return for the favored status granted.

Research reveals no previous decisions on either the ability of an Indian tribe to hold land in fee, if purchased, or the effect of giving purchased land reservation status. But that question need not be dealt with here. For it is clear that if the fee is in the state, it may be taken by the state. But if the fee is not in the state, then it is privately held. If privately held, the fee is subject to the power of eminent domain and just compensation for the taking, unless it falls within a category excluded by Federal law or the State Constitution. The plaintiff urges particularly Section 177 and Section 233 of Title 25 U.S.C.A., which was an amendment to the Indian Law becoming effective in September, 1952, and which the plaintiff claims excludes the alienation of lands in reservations in New York State. The Public Authorities Law,

---

berg, Fried and Frank, Attorneys for Plaintiff, dated May 12, 1958. Plaintiff's Exhibit No. 8A.

Notice of approval of contract entered into by the Tuscarora Indian Nation and the law firm of Strasser, Spiegelberg, Fried and Frank, authorized by the Deputy Commissioner of the Bureau of Indian Affairs, Department of the Interior, dated April 17, 1958. Plaintiff's exhibit No. 8B.

Section 1007 of the State of New York, contemplates a right of eminent domain in the sovereign state as granted in Section 21 of the Federal Power Act, 16 U.S.C.A. Section 814. Moreover, the acquisition of property as taken by the State Power Authority is the method outlined in the State Highway Law of New York, Section 30. See 212 F. 2d 227. Under the Federal Power Act, as held in *Missouri v. Union Electric Light and Power Company*, 42 F. 2d 692, necessity for taking property under power of eminent domain is exclusively within the power of Congress to determine by direct enactment or delegation of its power to an office or board. Under this section, a licensee, such as the Power Authority of the State of New York, has a general power to take. See *Burnett v. Nebraska etc.* 147 Neb. 458 23 N.W. 2d 266; *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276.

There is no constitutional requirement that the appropriation now involved be specifically authorized by an Act of Congress. The Federal law urged as applicable by plaintiff has been examined above and found to present no bar to the exercise of eminent domain. The State Constitution has been examined, and, far from presenting a bar to public condemnation, discloses an intent by the state to exercise exclusive control over Indian lands in New York.

In addition, Section 233 of Title 25 U.S.C.A. in its reference to the alienation of Indian lands in New York meant merely that the general law of New York relating to the alienation of land should not, as a result of Sec. 233, be construed to apply to Indian lands, but rather that the peculiar nature of such lands (i.e. a mere possessory right in the Indian Nations), should continue to be recognized. If the Congress had intended to place an absolute restraint on the alienation of Indian lands in New York, or to assert an absolute paramount authority in the Congress over New York Indian lands, it would not have chosen so incon-

grnous and unlikely a time and place to do so. If such a violent departure from the long history of dealing with and treating Indian lands had been intended, the Congress would surely not have done so in so casual and off-handed a manner. The parties have adduced nothing, either by way of legislative history or legal interpretation, to indicate that such was the intent of Congress. The plaintiff alleges that further acts on the part of the Power Authority, pursuant to the statutes of the State of New York, would, except for the intervention of this court, "interfere with the effective discharge of vital functions of the Federal Government, will frustrate the powers conferred by the Constitution upon the Congress of the United States, and are unlawful and will cause irreparable damage to plaintiff, for which it has no adequate remedy at law."

(1) *Jurisdiction*—While this court does not feel that a wholly federal question is raised here, nor that the usual jurisdictional limits of this court are met by the parties herein, this court has not been able to find any authorization for an Indian Tribe or Nation to institute a suit in state court seeking the relief sought here. Solely because plaintiff would be without the right to seek its present remedy if it were not allowed to maintain this action, this court assumes jurisdiction of the action, and proceeds to a consideration on the merits. (Sec. 5 N.Y. Indian Law; *King* v. *Warner*, 137 N.Y.S. 2d 568; *Bailey* v. *Miller*, 143 N.Y.S. 2d 122)

(2) *Three Judge Court*—Regardless of the pleadings and memoranda of the parties as to whether a constitutional question is presented, it is for the court to determine whether or not a claim of unconstitutionality is a substantial one. (*Patterson* v. *Hardin*, 145 F. Supp. 299) The view of this court is that the question presented is merely one of construction of a state statute as applied to this plaintiff. Having already determined that no substantial federal question is technically presented, and for

the reasons set forth below under point 3, this court concludes that no substantial constitutional question is raised, and that defendant Power Authority's motion for a three judge court must be denied. See *Wreide* v. *Waterfront Commission of New York Harbor*, D.C.N.Y. 1955, 132 F. Supp. 166; *Howard* v. *Ladner*, D.C. Miss. 1953, 116 F. Supp. 783, remanded for dismissal 347 U.S. 910.

(3) *Propriety of Taking*—As a result of the above analysis of the history and character of plaintiff's interest in the Tuscarora Reservation, there is no adequate reason why the taking by defendants of the land in dispute should not be confirmed. The motion for a permanent injunction must be, and is, denied. The temporary restraining order hereinbefore granted by Palmieri, D.J. and modified by Sugarman, D.J., each in the Southern District of New York, is dissolved. Plaintiff's motion that the temporary restraining order be continued pending appeal to the Circuit Court is denied. Plaintiff's motion that the affidavit of Henry S. Manley be stricken as an affidavit and considered by the court as an additional brief on behalf of defendants is granted.

(4) *As to Just Compensation*—This court adopts the reasoning of Lambaise, J. in *St. Regis* v. *State*, 158 N.Y.S. 2d 540, wherein the court held that although an Indian tribe may not bring suit in New York except by statutory authority, Section 30 of the Highway Law "would be clearly unconstitutional where it made no provision for compensation to those whose private property is to be taken for public use. While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover. *Litchfield* v. *Bond*, 186 N.Y. 66; *Sweet* v. *Rechel*, 159 U.S. 380." Neither Sec. 30 of the Highway Law nor Sec. 1007 of the Public Authorities Law set forth any

restriction or limitation "upon the legal status of the owner from whom the property is taken, and implicit therefor, if not explicit therein, is the right of an owner to have his day in court to prove his title or interest and to establish his damages." Though *St. Regis* v. *State*, supra, was reversed by the Appellate Division, Third Department, at 168 N.Y.S. 2d 894, the reversal appears to have been on other grounds. It is therefore the holding of this court that there is statutory authority for plaintiff herein to bring suit in the New York Court of Claims to determine the amount of just compensation for the taking herein, and that the Court of Claims is the proper forum for determining the question of compensation. The constitutional requirement of just compensation is met. A careful reading of the statute law, and the interpretation thereof by case law above cited, indicate that plaintiff has a right of action in the courts of the State of New York. Therefore, this court declines to accept jurisdiction of the question of compensation, or to impinge upon the jurisdiction of the New York courts, and leaves plaintiff to its state remedies in this respect. The complaint in this action is dismissed without costs. The above constitutes the findings of fact, conclusions of law and judgment of this court. The judgment is effective immediately. So ordered.

JUSTIN C. MORGAN
Justin C. Morgan
United States District Judge

Dated: June 24, 1958